

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-1247

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

IDOTHA KEY,

Appellant,

v.

ELLIOT RICHARDSON, Secretary of Health, Education
and Welfare,

Appellee.

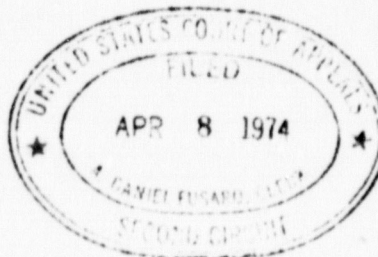
BRIEF FOR APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

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II.

Applicable Statutes

Section 202(e) of the Act, 42 U.S.C.A. §402(e) provides that:

- "(1) The widow . . . of an individual who died a full insured individual, if such widow . . .
- "(A) is not married,
- "(B) . . . (ii) has attained age 50 but has not attained age 60 and is under a disability (as defined in paragraph (6)) in which she becomes so entitled to such insurance benefits, . . .

* * *

- "(5) The period referred to in paragraph (1) (B) (ii), in the case of any widow . . ., is the period beginning with whichever of the following is the latest.
- "(A) The month in which occurred the death of fully insured individual . . . or
- "(B) The last month for which she was entitled to mother's insurance benefits on the basis of the wages and self-employment income of such individual, or
- "(C) The month in which a previous entitlement to widow's insurance benefits on the basis of such wages and self-employment income terminated because her disability had ceased, and ending with the month before the month in which she attains age 60, or, if earlier, with the close of the eighty-fourth month following the month, with which such period began."

III.

Section 223 of the Act, 42 U.S.C.A. §423, provides in pertinent part:

"(d) (1) The term 'disability' means

"(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months;"

* * *

"(2) For purposes of paragraph (1) (a)—

"(B) A widow, surviving divorced wife or widower shall not be determined to be under a disability (for purposes of section 202(e) or (f)) unless his or her physical or mental impairment or impairments are of a level of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity.

"(3) For purposes of this subsection, a 'physical or mental impairment' is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory techniques.

* * *

"(5) An individual shall not be considered to be under a disability unless he furnishes such medical or other evidence of the existence thereof as the Secretary may require."

IV.

Applicable Regulations

20 C.F.R. §404.1504 provides in part:

"A widow or widower shall for purposes of section 202(e) or (f) of the Act, be determined to be under a disability only if, in the absence of evidence that he or she is engaged in substantial gainful activity—

(a) His or her impairment or impairments meet the duration requirement in § 404.1501 and are listed in the appendix to this subpart; or

(b) His or her impairment or impairments are not listed in the appendix to this subpart, but singly or in combination meet the duration requirement in §404.1501 and are determined by the Secretary to be medically the equivalent of a listed impairment."

20 C.F.R. §404.1501 provides in part:

"(a) (iii) For purposes of determining entitlement to widower's insurance benefits (based on the widow's or widower's disability) under section 202(e) or (f) of the Act, respectively, for months after January 1968, the existence of a medically determinable physical or mental impairment or impairments expected to result in death or which have lasted or can be expected to last for a continuous period of not less than 12 months and of a level of severity deemed (pursuant to §404.1504) sufficient to preclude an individual from engaging in any gainful activity."

20 C.F.R. §404.1505 provides:

(a) An individual's impairment or impairments shall be determined to be medically the equivalent of an impairment listed in the appendix to this subpart B, only if the medical findings with respect thereto are at least equivalent in severity and duration to the listed findings of the listed impairment.

V.

- (b) Any decision made under §404.1502, §404.1504, or §404.1539 as to whether an individual's impairment or impairments are medically the equivalent of an impairment listed in the appendix to this subpart P, shall be based on medical evidence demonstrated by medically acceptable clinical and laboratory diagnostic techniques, including a medical judgment furnished by one or more physicians designated by the Secretary, relative to the question of medical equivalence. A "physician designated by the Secretary," shall include a physician in the employ of or engaged for this purpose by the administration, the Railroad Retirement Board, or a State agency authorized to make determinations of disability.

20 C.F.R. Subpart P, App. §1.04 provides:

Hypertrophic (osteo or degenerative), gouty, infectious or traumatic arthritis with:

- A. History of pain and stiffness in the involved joints; and
- B. X-ray evidence of joint space narrowing with osteophytosis (exostosis) or bony destruction with erosions and cysts, or subluxation, or ankylosis of involved joints and one of the following:
 - 1. Abduction of both arms at shoulders restricted to less than 90 degrees; or
 - 2. Ankylosis (fibrous or bony consolidation or fixation) of hip at less than 20 degrees or more than 30 degrees of flexion, measured from neutral position; or
 - 3. Ankylosis or fixation of knee at more than 10 degrees from neutral position; or
 - 4. Limitation of flexion of both hips to 50 degrees or less from neutral position (including ankylosis of both hips at any angle); or
 - 5. Limitation of flexion of both knees to 30 degrees or less from the neutral position (including ankylosis of both knees at any angle); or

VI.

6. Combined involvement of single hip and knee in contralateral extremity, with impairment in each as in 4 or 5 above; or
7. Reconstructive surgery or surgical arthrodesis of a major weight-bearing joint (hip, knee, ankle, or tarsal region) and return to full weight-bearing status did not occur, or is not expected to occur within 12 months of onset of disability; or
8. X-ray evidence of lumbar abnormalities as in B above with motion of dorsolumbar spine limited to 5 degrees or less from neutral position and impairment of single hip or knee as in 4 or 5 above.

20 C.F.R. Subpart P, App. §3.00 provides in part:

- A. Cause of disability: The disability produced by respiratory disease usually results from chronic recurrent infection, communicability or from pulmonary insufficiency or a combination of these factors.
- B. Pulmonary tuberculosis is a communicable disease and disability is determined primarily on the basis of the activity of the disease. Individuals with "inactive" or "quiescent" disease are not considered to be under a disability on the basis of tuberculosis, whereas individuals with "active" tuberculosis are considered to be under a disability.

VII.

Cases:

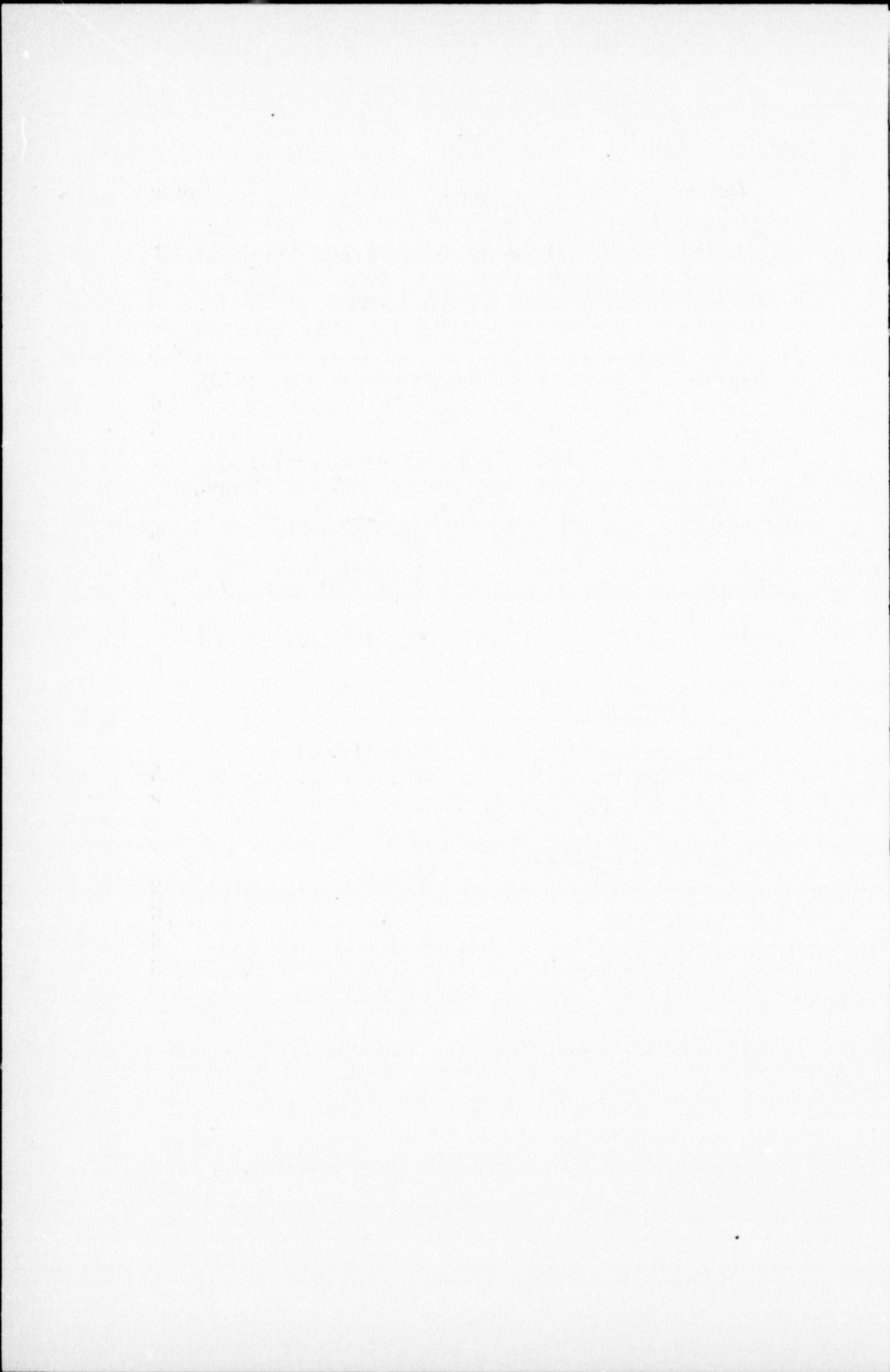
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Appellee.

BRIEF FOR APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

Preliminary Statement

Appellant instituted this action under Section 205(g) of the Social Security Act, as amended, 42 U.S.C.A., § 405(g), for judicial review of the Secretary of Health, Education and Welfare's final decision disallowing her claim for widow's disability benefits, after having obtained no relief administratively. This case is now before this Court on appeal by Mrs. Key from the decision of the United States District Court, the Honorable John O. Henderson, granting the government's motion of summary judgment, and denying appellant's claim for disability payments.

Issues Presented

1. Did the Social Security Administration provide appellant with sufficient information when denying her claim, so that she was able to adequately pursue further remedies?
2. Was the decision of the Social Security Administration that plaintiff was not under a disability as the term is defined for the purposes of widow's disability benefits supported by substantial evidence?

Statement of Facts

On August 12, 1969, shortly after the death of her husband, the appellant filed an application for Disabled Widows Insurance Benefits (Tr. 71-74, 75-76), alleging that she became unable to work on June 15, 1959, at age 47. The application was denied initially on January 21, 1970, (Tr. 77) and following a request for reconsideration (Tr. 79) was again denied by the Bureau of Disability Insurance of the Social Security Administration on November 24, 1970 (Tr. 90-91). The appellant, who by now had sought the assistance of an attorney, requested a hearing (Tr. 31) and on May 13, 1971 a Notice of Hearing was sent to appellant and her attorney (Tr. 27). The appellant and her attorney appeared before the Hearing Examiner who considered the case *de novo*, (Tr. 32-68); on July 12, 1971, the Hearing examiner found that she was not under a "disability" as defined in Section 223(d) of the Social Security Act, as amended, 42 U.S.C.A. § 423, and thus she was not entitled to widow's insurance benefits based on disability, § 202(e) of the Act, 42 U.S.C. § 402(e) (Tr. 10-22). The Hearing Examiner's decision was approved by the Appeals Council on November 23, 1971 (Tr. 4).

On January 7, 1972, appellant began an action in the United States District Court for the Western District of New York seeking a judgment reviewing and reversing the decision of the Hearing Examiner and the Appeals Council, and allowing her claim for Social Security Disability benefits. Following motions for summary judgment by both appellant and appellee, the United States District Judge, the Honorable John O. Henderson, denied the appellant's motion for summary judgment and granted the motion for summary judgment by the government.

ARGUMENT

POINT I

The Social Security Administration did provide appellant with sufficient information when denying her claim, so that she was able to adequately pursue further remedies.

The record is clear that the appellant, and her attorney, were provided in detail with the reasons for the denial of her claim as well as the procedural steps she should follow and the extent of her burden. The information supplied to appellant, and her counsel, came at the early stages of this proceeding and provided her with an eminently fair opportunity to assess the position of the Social Security Administration and to prepare her claim, administratively and in the courts. Appellant's argument that she lacked a "proper frame of reference" from which to proceed appears wholly without merit.

It is true that the original letter denying her claim set forth no reasons (Tr. 77). It did, however, clearly advise in simple, non-technical language her right to request a reconsideration of her claim, which reconsideration she did

request (Tr. 79). In a letter denying her claim after reconsideration (Tr. 90), the appellant and her attorney were advised of the essential medical reasons for the denial of her claim, as well as her additional rights of administrative appeal. It must also be noted, of course, that the specific disability requirements are a matter of public record and were available both to appellant and her attorney.

Following appellant's request for a hearing on March 4, 1971 (Tr. 31), a Notice of Hearing was sent to her advising when the hearing would be held (Tr. 27, 28) and further advising *in detail* as to the requirements for establishing her claim for Widows Insurance Benefits based upon disability, the issues in the case, and the statute pursuant to which her claim must be established. Moreover, she was advised as to the conduct of the hearing, and that she would have an opportunity to examine the evidence in the case either on the day of the hearing or before the day of the hearing if she wished. In fact, the record indicates that the appellant's attorney did take the opportunity to review her file in order to prepare her case prior to the hearing of June 4, 1971 (Tr. 92). During the hearing, counsel waived the opening statement and thereafter, at counsel's request, the Hearing Examiner entered additional evidence into the record; there is no question as to counsel's active and thorough participation in the hearing (Tr. 33-68).

Consequently, there can be no doubt that during the course of the administrative proceedings the appellant was accorded all rights available to her and was accorded full opportunity to establish her claim. And too, as appellant recognizes, the Hearing Examiner's decision (Tr. 10-22) fully advised her of the basis on which the Secretary's final decision was based.

Appellant cannot now claim that because the initial determination was not set forth with such detail as the Hearing Examiner's *de novo* decision that she was denied due process. The fact that a party has been afforded all his procedural rights at some stage in the administrative process is sufficient for due process purposes and is not a ground for reversible error even if all rights were not afforded at the initial stage. *Zanders v. Louisiana State Board of Education*, 281 F.Supp. 747 (W.Da.La., 1968) and *Richardson v. Perales*, 402 U.S. 389 (1971); *Rocker v. Celebrezze*, 358 F.2d 119 (2nd Cir., 1966). See also Davis, *Administrative Law Treatise*, 448, § 7.10 (1958). Appellant, having been represented by counsel, cannot properly assert that she was denied the opportunity of a full and fair consideration of her claim. *Granger v. Finch*, 425 F. 2d 206 (7th Cir., 1970). There is absolutely no showing that the consideration of appellant's claim was incomplete or unfair, or that there was a lack of due process. *Davis v. Richardson*, 460 F.2d 772 (3rd Cir., 1972).

POINT II

The decision of the Social Security Administration that plaintiff was not under a disability as the term is defined for the purposes of widows disability benefits is supported by substantial evidence and should not be disturbed by this Court.

In order for appellant to be entitled to benefits as a disabled widow, she must have a physical or mental impairment or impairments which are of a level of severity under regulations prescribed by the Secretary of Health, Education and Welfare, deemed to be sufficient to preclude an individual from engaging in any gainful activity. Act § 223 (d) (2) (B) 42 U.S.C.A., § 423 (d) (2) (B).

The use of the term "any gainful activity" in the test for widow's disability as opposed to "any substantial gainful activity" which appears in the definition of disability for a worker applying for disability benefits on the basis of his own earnings, is a demonstration of the Congressional intent that the disability test for widows be more strict than the test for disabled workers.

The regulations called for by the statute, 20 C.F.R., § 404.1504, provide that the widow's impairment or impairments must attain a degree of severity listed in the appendix to this subpart; or must be determined by the Secretary to be medically the equivalent of a listed impairment. 20 C.F.R., § 404.1505, provides that an individual's impairments shall be determined to be medically the equivalent of an impairment listed in the appendix to Subpart P only if the medical findings with respect thereto are at least equivalent in severity and duration to the listed findings of the listed impairment. The regulations further provide that such determination of medical equivalence shall be based on medical evidence demonstrated by medically acceptable clinical and laboratory diagnostic techniques, including a medical judgment furnished by one or more physicians designated by the Secretary relative to the question of medical equivalence.

Of course, in a disabled widow's claim as in other disability cases, the claimant has the burden of producing evidence showing that she meets the criteria of the Act. Act § 223 (d) (5), 42 U.S.C.A. § 423 (d) (5); *Franklin v. Secretary of HEW*, 393 F.2d 640 (2nd Cir., 1968).

The standard of disability for widows has been upheld in a number of cases. *Frasier v. Finch*, 313 F.Supp. 160 (N.D. Ala., 1970), *Aff'd* 423 F.2d 597 (5th Cir., 1970); *Barnes v. Richardson*, 322 F.Supp. 699 (W.D.Tenn., 1970); *Wright v.*

Richardson, 320 F.Supp. 931 (W.D.Va., 1970); *Henry v. Richardson*, 320 F.Supp. 296 (E.D.Tenn., 1970); *Hendrix v. Finch*, 310 F.Supp. 513 (D.S.C., 1970).

Although the appellant asserted that she was disabled, a comparison of her condition as diagnosed by the doctors who examined her with the standards set forth in the Regulations, caused the Secretary of Health, Education and Welfare to conclude that she simply did not meet the requisite level of severity in the listings, and hence was not entitled to such benefits.

The initial decision of the Social Security Administration and its reconsideration decision, the decision of the Hearing Examiner (who welcomed and received evidence by the appellant) with subsequent approval by the Appeals Council, and finally, the decision of the United States District Judge, all were based on a competent review of the entire array of evidence submitted. In this respect, the reports of Dr. Stein, one of her examining physicians, clearly indicate that appellant's osteoarthritis was not a disabling impairment which could be expected to last for a continuous period of twelve months. Instead, they show that her condition is subject exacerbations and remissions which occur every few months. In addition, when she was not having an exacerbation she was able to walk and perform tasks around the house. Moreover, the detailed report of Dr. Bertola shows that appellant's condition did not meet the requirements as enunciated by the Secretary. Dr. Bertola concluded that appellant had a full range of motion in her spine, and that her arthritis was commensurate with her age group. He reported that in his opinion she was able to do light bench work and stand for periods of under two hours, sit for unlimited periods of time, and lift objects lighter than twenty pounds. Nor does the other evidence of record with respect to appellant's lung condition when

considered in connection with appellant's arthritis meet the requirements as enunciated by the Secretary. It should be noted in this respect that Dr. Stein felt appellant's tuberculosis was inactive and Dr. Ciesla reported that appellant's lungs were clear and diagnosed her tuberculosis as inactive.

Thus, it is clear that the Secretary of Health, Education and Welfare had substantial evidence on which to support a denial of appellant's claim. This being so, the Secretary's decision should not now be disturbed by this Court. *Franklin v. Secretary of HEW, supra.*; *Brasher v. Celebrezze*, 340 F.2d 413 (8th Cir., 1965); *Davis, supra* Vol. 4, 114, 118, §§ 29.01, 29.02.

Conclusion

It is respectfully submitted that for the foregoing reasons the decision of the District Court be affirmed.

Respectfully submitted,

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EDWARD J. WAGNER,
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City of Batavia)

RE: Idetha Key

v

Elliet Richardson et al
Becket No. 74-1427 1247

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duly sworn, say: I am over eighteen years of age
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5 day of April, 1974

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1975